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In The

Supreme Court of the United States

October Term, 1997

SHIRLEY C. CAIN, individually and as Personal Representative of the Estates of BRIAN KEITH THOMPSON, GREGORY ALLAN HERLITZKA, LYNETTE LORRAINE HERLITZKA and CYNTHIA S. HERLITZKA,

Petitioner,

vs.

THE CITY OF TACOMA, a Municipal Corporation,

Respondent,

and the TACOMA HOUSING AUTHORITY, a Municipal Corporation, and DOES I THROUGH V, inclusive,

Defendants.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner brought a wrongful death action against the City of Tacoma (respondent) and the Tacoma Housing Authority for damages arising from the 1988 fire-related deaths of four persons in an apartment complex owned by the Tacoma Housing Authority. During the litigation process, the Tacoma Housing Authority, which owned, managed, and operated the apartments, settled with the petitioner.

Petitioner first filed suit against the Tacoma Housing Authority in 1988, asserting three claims for relief: violation of federal civil rights, strict premises liability, and negligence. In a Third Amended Complaint, the petitioner added respondent City of Tacoma ("City") as a defendant. In 1990, the City moved for summary judgment on all claims. The trial court denied the motion; the City obtained discretionary review of this denial from the Washington State Court of Appeals, Division II, in 1991.

By unpublished opinion dated January 31, 1994, the Court of Appeals for the most part reversed the trial court's denial of the City's Motion for Summary Judgment. (Appendix to Petition, A-6 et seq.) In its reversal, the Court of Appeals rejected all of the petitioner's federal claims and most of her substantive state claims (A-12 - A-15), and remanded the case to the trial court for a narrow factual determination: The size of a third floor bedroom window (i.e., whether or not the bedroom window in the fire unit met the size requirement of a fire code provision regarding windows as 'second exits'.) The Court of Appeals held that if the window met the size requirements of a Tacoma ordinance, then petitioner's last remaining state law claim must be dismissed. (A-17 - A-18).

Petitioner never sought review of the state Court of Appeals' 1994 decision. She had the right to petition the Washington

State Supreme Court for review of that decision, which right she never availed herself of; the 1994 decision of the Court of Appeals became final and the case was remanded to the trial court. Ultimately, upon further summary judgment proceedings, the trial court found that the window size requirements of the City's ordinance were met, and consequently, following the express instructions of the Court of Appeals, it dismissed petitioner's remaining state law claim on December 29, 1995. (A-19 - A-21).

Petitioner appealed to the Washington Supreme Court, which transferred the case to Division II of the Washington State Court of Appeals for decision. By unpublished opinion filed October 10, 1997, the Court of Appeals held that the trial court had precisely executed its instructions upon remand, that there was no dispute as to the size of the window and petitioner did not contend otherwise, and it accordingly affirmed the trial court's dismissal of the case. (A-22 - A-29).

The Washington Court of Appeals in the 1997 decision addressed petitioner's contentions that the 1994 Court of Appeals' ruling had been wrongly decided. It noted that petitioner had never sought review of the 1994 decision. It thus restricted its examination of the earlier decision under "law of the case" principles. It independently examined the earlier decision in that light, notwithstanding the fact that petitioner never made any contention as to why law of the case principles should not preclude her arguments. The Court of Appeals held that the 1994 decision was neither clearly erroneous nor did it create a manifest injustice, thereby rejecting petitioner's renewed attack on the older decision.

The Washington Supreme Court denied petitioner's timely petition for review of the 1997 Court of Appeals' decision, and petitioner has now brought this Petition for a Writ of Certiorari.

SUMMARY OF REASONS WHY THE WRIT SHOULD BE DENIED

A. Petitioner seeks review of substantive decisions made by the Washington Court of Appeals in 1994. She never sought review of that decision before the Washington Supreme Court. Accordingly, the decisions of which she seeks review were not made by the state court of last resort, and this Court thus has no certiorari jurisdiction.

B. The first of petitioner's "questions presented for review" in her petition was never in dispute — the City never argued nor did the state court ever rule that the state's statute of repose applied to petitioner's federal claims.

C. The second of petitioner's "questions presented for review" in her petition is in essence a meaningless *non sequitur* — the Tacoma Housing Authority is not an agency of the City, and petitioner never made any showing of any contract, statute, or regulation which required the City to enforce HUD regulations with regard to the apartments in question.

D. The 1997 State Appeals Court decision which petitioner seeks to have reviewed was decided upon narrow factual grounds and "law of the case" grounds, neither of which are suitable for certiorari review.

E. In any event, the decisions petitioner seeks to have reviewed constituted unremarkable applications of settled rules of law in a fact-specific context.

DISCUSSION OF REASONS FOR DENYING THE WRIT

I.

THE DECISIONS FROM WHICH PETITIONER PURPORTS TO SEEK REVIEW WERE NOT RENDERED BY THE HIGHEST STATE COURT IN WHICH A DECISION COULD BE HAD. THIS COURT THUS LACKS CERTIORARI JURISDICTION.

The Supreme Court's certiorari jurisdiction over state court decisions is limited to final judgments or decrees rendered by the highest court of a state in which a judgment could be had. 28 U.S.C. § 1257.

The 1994 opinion of the Washington State Court of Appeals, Division II, is the only court decision which directly addressed the substance of petitioner's federal law claims. It is undisputed the petitioner never sought review of the 1994 Court of Appeals' decision, and it is equally undisputed that she had a right to seek discretionary review by the state Supreme Court of that decision had she filed a petition for discretionary review within thirty days of the Court of Appeals' decision. (Washington Rules of Appellate Procedure 13. *See* A-24).

Therefore, of course, when the matter was again before the state Court of Appeals in 1997, petitioner's attack on the 1994 decision was rejected on "law of the case" grounds after the court's determination that the earlier decision was neither clearly erroneous nor involved a manifest injustice. Thus, the Supreme Court's certiorari jurisdiction cannot be invoked in this case. *See Banks v. California*, 395 U.S. 708, 23 L. Ed. 2d 653, 89 S. Ct. 1901 (1969), *reh. den.*, 396 U.S. 869, 24 L. Ed. 2d 124, 90 S. Ct. 36; 28 U.S.C. § 1257.

II.

THE FIRST "QUESTION PRESENTED" BY THE PETITION HAS NEVER BEEN IN DISPUTE.

The first of petitioner's "questions presented for review" in the Petition for Writ of Certiorari is the following:

> Can a State statute of repose be applied to bar federal claims under 42 USC § 1983 and federal claims as third party beneficiaries of HUD regulations and contracts?

The answer to this question is, in short, **no**, at least not in the context of this case. But the City never contended that petitioner's federal claims were barred by the state construction statute of repose. The Court of Appeals in its 1994 decision never held that they were. Indeed, any reading of that opinion will show that the court's resolution of petitioner's federal law claims was on their merits, and had nothing to do with the statute of repose. The state construction statute of repose was asserted by respondent as a defense to petitioner's state law claims of failure to enforce municipal building codes with reference to the 1979 remodel of the Conifer Apartments — nothing more, nothing less.

The assertion of this non-issue as the principal "question presented" by a petition to the United States Supreme Court for a writ of certiorari is inexplicable. In short, this is a position that no party has ever asserted and that no court has ever ruled upon. Petitioner's conjuring it up now merely underscores the lack of merit to her petition.

III.

PETITIONER'S ADDITIONAL "QUESTION PRESENTED" IS LIKEWISE ILLUSORY.

The second and final "question presented for review" by petitioner is the following:

> Can a city avoid the responsibility to provide safe housing under HUD funding regulations and contracts by creating a housing authority?

This tortured argumentative question can be disposed of summarily. First, the City of Tacoma never "created" a housing authority. Housing authorities are independent municipal corporations created by state law. The City's only role in the formation of a housing authority under state law is by resolution to declare the need for it. Revised Code of Washington 35.82.030. The Tacoma Housing Authority is not an agency of the City, is not controlled by the City, and it, not the City, acquired and operated the apartment units at issue. This was always undisputed (as noted in the 1994 Court of Appeals decision), and it is unchanged by such disingenuous statements by petitioner as found at page 1 of the Petition, that the apartments in question were acquired "by the City through its housing authority". The City never acquired the apartments, never remodeled them, never owned them, never operated them, never maintained them.

But at bottom, the ineluctable fact of the matter is that in the ten-year history of this litigation up to and including the instant petition, the petitioner has *never* cited any case, any statute, any regulation, any contract, or any other authority whatsoever establishing that the City of Tacoma had any duty to enforce HUD regulations with regard to the subject properties

owned and operated by the Tacoma Housing Authority. This was observed by the Washington Court of Appeals in its opinion in 1994. It hasn't changed a bit since.

IV.

NO QUESTIONS APPROPRIATE FOR CERTIORARI REVIEW ARE PRESENTED BY THIS CASE.

As indicated above, and as shown by a reading of the 1997 Court of Appeals' opinion, the state court found the 1994 decision of the Court of Appeals to be the "law of the case" with respect to petitioner's substantive claims, including her federal claims. This was precisely because of petitioner's failure to seek review of the 1994 Court of Appeals' decision. Nothing about such a disposition meets the criteria of the considerations governing review on certiorari as set out in Rule 10 of the Rules of the Supreme Court. Application of "law of the case" principles constitutes a routine application of state law. The disposition of the case petitioner seeks to have reviewed thus involves no question of federal law at all.

Lastly, as Rule 10(c) of this Court's rules provides, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Even if this Court had jurisdiction to review the decisions that the state Court of Appeals made in 1994, that court's decision at that time reflects an unremarkable application of settled federal legal principles. The petitioner had asserted a 42 U.S.C. § 1983 claim against the City, contending first that the City's alleged failure to adequately enforce applicable codes and regulations amounted to a constitutional deprivation and, secondly, that she had a private cause of action under that statute

against the City for its supposed failure to enforce applicable HUD regulations even without a showing of a constitutional deprivation. The first claim failed because it sounded in mere negligence, which does not normally give rise to a private cause of action under 42 U.S.C. § 1983. *See e.g. Daniels v. Williams*, 474 U.S. 327, 329-36, 88 L. Ed. 2d 662, 100 S. Ct. 662, 677 (1986); *Davidson v. Cannon*, 474 U.S. 344, 347-48, 88 L. Ed. 2d 677, 106 S. Ct. 668 (1986). As to the second prong of her 42 U.S.C. § 1983 claim, as has been discussed above, the petitioner was never able to make any showing whatever of a duty on the part of the City to enforce HUD regulations. These matters are addressed in the 1994 Court of Appeals' opinion. (A-12 - A-15). As to the negligence claim based upon 42 U.S.C. § 1983, the law is clear and settled. As to the claim in regard to the HUD regulations, petitioner to this day has never made any showing of duty; much less did she do so by the time of the 1994 Court of Appeals' disposition.

CONCLUSION

The Petition for Writ of Certiorari should be dismissed for lack of jurisdiction. Alternatively, it should be denied for the reasons stated.

Respectfully submitted,

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